

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DUSTIN DEVON MAHAN,

Defendant-Appellant.

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UNPUBLISHED

October 14, 2008

No. 279244

Wayne Circuit Court

LC No. 06-013126-01

Before: Meter, P.J., and Talbot and Murray, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for assault with intent to rob while armed, MCL 750.89, carrying a concealed weapon (CCW), MCL 750.227, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b.<sup>1</sup> Defendant was sentenced to 8 to 20 years' imprisonment for the assault with intent to rob while armed conviction, 40 months to 5 years' imprisonment for the CCW conviction, and two years' imprisonment for the felony-firearm conviction. We affirm.

Defendant sets forth three reasons for his assertion that his trial counsel was ineffective. First, defendant claims that his attorney was ineffective for failing to file a pretrial motion to suppress the testimony of prosecution witnesses Corey Fenderson and Bruce Tarver. Second, defendant contends that defense counsel erroneously elicited his testimony regarding his postarrest, post-*Miranda*<sup>2</sup> silence. Third, defendant asserts that his attorney was ineffective because he failed to object to the trial court's omission of an element of assault with intent to rob while armed in the jury instructions. We disagree with all three of defendant's claims of ineffective assistance of counsel.

An ineffective assistance of counsel claim is a mixed question of law and fact. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). A trial court's findings of fact, if any, are reviewed for clear error, and the ultimate constitutional issue arising from an ineffective assistance of counsel claim is reviewed by this Court de novo. *Id.* Defendant did not bring a

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<sup>1</sup> The jury acquitted defendant of assault with intent to commit murder, MCL 750.83.

<sup>2</sup> *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

motion for a new trial on the basis of ineffective assistance of counsel, and failed to request a *Ginther*<sup>3</sup> hearing before the trial court. Moreover, this Court denied his motion to remand for an evidentiary hearing with respect to his ineffective assistance of counsel claim. Accordingly, defendant's claim of ineffective assistance of counsel is unpreserved and this Court's review is limited to mistakes apparent on the record. *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002). A defendant has waived the issue if the record on appeal does not support his assignments of error. *People v Sabin (On Second Remand)*, 242 Mich App 656, 659; 620 NW2d 19 (2000).

Ineffective assistance of counsel is established only where a defendant is able to demonstrate that trial counsel's performance "fell below an objective standard of reasonableness and that this was so prejudicial to him that he was denied a fair trial." *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). A defendant is required to overcome a strong presumption that sound trial strategy motivated trial counsel's conduct. *Id.* Additionally, in order to show prejudice, a defendant must demonstrate a reasonable probability that the result of the proceedings would have been different but for the counsel's errors. *Id.* at 302-303. Counsel's performance is "measured against an objective standard of reasonableness under the circumstances and according to prevailing professional norms." *People v Solmonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004). Moreover, "this Court neither substitutes its judgment for that of counsel regarding matters of trial strategy, nor makes an assessment of counsel's competence with the benefit of hindsight." *People v Matuszak*, 263 Mich App 42, 58; 687 NW2d 342 (2004).

Defendant first argues that he received ineffective assistance of counsel because his attorney failed to file a pretrial motion to suppress the allegedly coerced testimony of Fenderson and Tarver. We disagree. Defendant correctly points out that "[b]oth our Supreme Court and this Court have strongly condemned prosecutorial intimidation of witnesses." *People v Stacy*, 193 Mich App 19, 25; 484 NW2d 675 (1992), citing *People v Pena*, 383 Mich 402; 175 NW2d 767 (1970). Defendant is also correct in stating that police intimidation and threats are attributable to the prosecution. *Stacy*, *supra* at 25, citing *People v Hooper*, 157 Mich App 669, 675; 403 NW2d 605 (1987). Nevertheless, defendant invites this Court to leap too wide a gulf when he urges us to conclude that defense counsel should have attempted to suppress the testimony of Fenderson and Tarver as the alleged result of police intimidation merely because Fenderson and Tarver were arrested during the investigation of the shooting and implicated defendant. There is no record evidence that either the police or the prosecution intimidated or coerced Fenderson or Tarver, and defendant cites no authority to support his proposition that their arrests, without evidence of coercion or intimidation, rendered their testimony inadmissible. To the contrary, according to Detroit Police Officer Steven Brown, after Tarver was arrested, he came forward and volunteered information that implicated defendant in the shooting.

To the extent that defendant suggests that the "dragnet arrests" of Fenderson and Tarver were illegal, he did not have standing to seek the suppression of their testimony on the basis of alleged violations of their Fourth Amendment rights. *People v Foster*, 174 Mich App 505, 508;

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<sup>3</sup> *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

436 NW2d 397 (1988) (concluding that the trial court erred in allowing the defendant to assert another's Fourth Amendment rights vicariously). Furthermore, because defendant cannot support with evidence or authority his proposition that Fenderson's and Tarver's testimony was inadmissible, there is no indication that the trial court would have granted a motion to suppress the testimony. Failing to advance a meritless argument or raise a futile objection does not constitute ineffective assistance of counsel. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000). Under the circumstances, defendant cannot demonstrate that defense counsel's performance was objectively unreasonable.

Further, defendant cannot show that defense counsel's allegedly deficient performance resulted in outcome-determinative prejudice. Although defendant argues that the testimony of Fenderson and Tarver was crucial to the prosecution's case, he fails to acknowledge the testimony of the victim, Christopher Dreachslin, regarding the events preceding the shooting. The jury could have believed Dreachslin's testimony that he was positive that the person wearing the distinctive leather jacket recovered from defendant's residence, which defendant admitted wearing on the night of the shooting, was the person who shot him, regardless of inconsistencies in the accounts provided by Fenderson and Tarver. This Court will not interfere with the fact-finder's role in weighing the evidence and judging the credibility of witnesses. *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748, amended 441 Mich 1201 (1992). Because defendant cannot demonstrate that counsel's performance in failing to file a motion to suppress the testimony of Fenderson and Tarver was objectively unreasonable under the circumstances, and cannot show that the alleged error affected the outcome of the case, his claim that he received the ineffective assistance of counsel at trial fails.

Defendant next claims that he received ineffective assistance of counsel at trial because his trial counsel elicited his testimony that he remained silent instead of providing a statement to the police. We disagree.

Defendant testified during direct examination that after he was arrested, he was transported to the police station, where investigators questioned him about the shooting. Defendant testified that he did not want to make a statement to the police at that time and asked to speak to a lawyer. Generally, after a criminal defendant has been advised of his right to remain silent, his silence may not be used as evidence against him. *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966); *People v Dennis*, 464 Mich 567, 574; 628 NW2d 502 (2001). A prosecutor may not comment on an accused's postarrest, post-*Miranda* silence. *Doyle v Ohio*, 426 US 610, 619-620; 96 S Ct 2240; 49 L Ed 2d 91 (1976); *People v Goodin*, 257 Mich App 425, 432; 668 NW2d 392 (2003). While the deliberate use of a defendant's post-*Miranda* silence can amount to constitutional error, an isolated and inadvertent reference does not. *Dennis*, *supra* at 579-580.

Defendant fails to rebut the strong presumption that sound trial strategy motivated defense counsel's decision to refer to defendant's postarrest silence. Defense counsel's reference to defendant's postarrest silence is consistent with an argument articulated in defendant's opening statement, where counsel averred:

Okay. My client's just in the house, and he doesn't even give a statement to the police because he doesn't even know what he's being arrested for. Period.

This argument suggests that defense counsel's strategy in eliciting defendant's testimony that he exercised his right to remain silent was to demonstrate to the jury that defendant was both surprised by his arrest and concerned that he had been wrongly accused. Further, defendant cannot demonstrate that he was prejudiced by his counsel's question regarding his postarrest silence. *Toma, supra* at 302-303. The prosecution did not explore the topic of defendant's postarrest silence on cross-examination, and the record does not show that defendant's decision to remain silent was mentioned by either the prosecution or defense counsel thereafter. Accordingly, there was no reasonable likelihood that counsel's question regarding defendant's postarrest, post-*Miranda* silence affected the outcome of the trial. Because defendant has failed to rebut the presumption that defense counsel's isolated question regarding his postarrest silence was a strategic decision, and he failed to show prejudice, his ineffective assistance of counsel claim fails.

Defendant next claims that he received ineffective assistance of counsel because defense counsel failed to object to the trial court's jury instructions that omitted an element of assault with intent to rob while armed. We disagree.

"The elements of assault with intent to rob while armed are: (1) an assault with force and violence; (2) an intent to rob or steal; and (3) the defendant's being armed." *People v Akins*, 259 Mich App 545, 554; 675 NW2d 863 (2003). The record demonstrates that the trial court did in fact omit an element of the jury instructions relating to the assault with intent to rob while armed charge, which required the jury to find that defendant was, in fact, armed in order to convict him. It was objectively unreasonable for defense counsel to maintain, contrary to the record, that the trial court had in fact instructed the jury that defendant was required to have been armed in order to convict him of assault with intent to rob while armed. Nevertheless, defendant's ineffective assistance claim lacks merit because he cannot demonstrate that he was prejudiced by his counsel's failure to object to the jury instruction.

Following the trial court's instruction with regard to assault with intent to rob while armed, the trial court instructed the jury with respect to the elements of CCW and felony-firearm, which defendant did not contest below and does not contest on appeal. Although defendant offers a rather strained and speculative theory regarding how the jury could have applied the facts to the elements of assault with intent to rob as instructed, the fact that the jury concluded that defendant was guilty of CCW and felony-firearm persuades us that the jury also believed that defendant was armed when he assaulted Dreachsline with the intent to rob him. Supporting this conclusion is the description of the offense, "Assault with Intent to Rob while Armed," as it appeared on the verdict form. Further, while instructing the jury, the trial court related the felony-firearm charge to the assault with intent to murder and assault with intent to rob charges, and not the CCW charge. Because defendant cannot demonstrate that a different outcome would have resulted had his trial counsel objected to the erroneous jury instruction, his third and final ineffective assistance of counsel claim fails. *Toma, supra* at 302-303.

Defendant next argues that the trial court's failure to properly instruct the jury with respect to the elements of assault with intent to rob while armed constitutes plain error, and because the trial court's instructional error affected the verdict, he is entitled to a new trial. We disagree.

A party must object to or request a jury instruction before the jury deliberates in order to preserve a challenge to the trial court's direction of the jury on appeal. MCR 2.516(C); *People v Gonzales*, 256 Mich App 212, 225; 663 NW2d 499 (2003). See, also, *Sabin*, *supra* at 657-658. Defendant not only failed to object to the jury instructions given by the trial court, but expressed satisfaction with the instructions to the extent that counsel affirmatively indicated that the jury was properly instructed. As a general rule, a defendant waives the right to appellate review where he expresses satisfaction with the specific actions of a trial court. *People v Carter*, 462 Mich 206, 219; 612 NW2d 144 (2000). Waiver precludes appellate review of the issue, and extinguishes any error. *Id.* at 215-216. Here, because defendant expressed satisfaction with the trial court's instruction, to the extent that he now claims that the trial court improperly instructed the jury with respect to the elements of assault with the intent to rob while armed, he has waived appellate review of this issue. *Id.* at 215-216, 219. Accordingly, we decline to consider this issue further.

Affirmed.

/s/ Patrick M. Meter  
/s/ Michael J. Talbot  
/s/ Christopher M. Murray